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Rejecting asymmetry of access to formal relationship statuses for same and different-sex couples at Strasbourg and domestically

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Abstract

This article interrogates the extent to which the formal recognition and protection of same and different-sex relationships at Strasbourg and in domestic courts has been accepted as attracting human rights protection. In order to do so it considers how far equality of access to formalised relationship statuses as between same and different-sex couples has arisen in the ECHR *contracting states. Inequality of access—asymmetry of access—arises, it will be argued, in its most obvious and pernicious form in those Eastern contracting states in which different-sex couples who wish to live together can access one of two options: cohabitation or marriage, while same-sex couples are confined to cohabitation only. But a form of asymmetry also arises in states which have introduced registered partnerships for same-sex couples, leaving availability of marriage only to different-sex ones. Other forms of asymmetry of access are also explored. This article argues for taking further steps towards creation of symmetry of access to formal relationship statuses in Member States on human rights grounds, but also pragmatically, in order to strengthen the consensus in the contracting states on this matter, and therefore place the Strasbourg Court more clearly at the forefront of addressing the inequalities thereby arising, where Member States have so far failed to do so.*

Introduction

This article interrogates the extent to which the formal recognition and protection of same and different-sex relationships at Strasbourg and in domestic courts has been accepted as attracting human rights protection. In order to do so it considers how far equality of access to formalised relationship statuses as between same and different-sex couples has arisen in the ECHR contracting states. Inequality of access—asymmetry of access—arises, it will be argued, in its most obvious and pernicious form in those "Eastern" contracting states[1] in which different-sex couples who wish to live together have available two options: marriage or cohabitation, while same-sex couples are confined to cohabitation only (and even that option may not be***E.H.R.L.R. 545*** an effective one in certain states).[2] But a form of asymmetry also arises in states which have introduced registered partnerships[3] for same-sex couples, leaving the availability of marriage only to different-sex couples. Other forms of asymmetry also arise, as will be explored.

In furtherance of the argument that forms of asymmetry of access to formal relationship statuses (hereafter "asymmetry of access") should be more fully and

clearly recognised as creating rights-violations, this article will argue that the dominant—but not the only—value underpinning the introduction of same-sex registered partnerships and/or same-sex marriage in Member States is and should be that of creating equality as between same and different-sex couples. The difficulty of relying on the Strasbourg Court to advance equality in this respect will be outlined: adjudicating in an increasingly nationalistic context, it has sought, as will be argued, enhanced reliance on devices enabling it to express self-restraint,[4] most obviously the margin of appreciation doctrine, influenced by analysis of the changing acceptance of same-sex registered partnerships and marriage in the Member States (consensus analysis).[5] It will therefore be contended that incrementally discarding asymmetry of access to formal relationship statuses based in effect on sexual orientation[6] in Member States could in turn influence the stance taken at Strasbourg when it considers challenges to such asymmetry.

This article will proceed as follows. Part 1 will briefly sketch a picture as to the refusal thus far to introduce formalisation of same-sex unions in some Eastern Member States, and as to the introduction of same-sex registered partnerships, and marriage, predominantly in a range of Western Member States. It will consider the resultant creation of asymmetry of access to relationship statuses in certain Member States. Part 2 will evaluate the contribution of Strasbourg to the creation of greater symmetry of access to formal relationship statuses as between same and different-sex couples under art.8(1) of the ECHR, either read alone or with art.14, looking in particular at the factors appearing to limit the Court's deployment of its evolutive approach in this context, which are likely to be linked to resistance to introducing same-sex registered partnerships or marriage in most Eastern Member States. Part 3 will consider the judicial treatment of the Strasbourg jurisprudence in the litigation in three recent cases on asymmetry of access to formalisation of relationship statuses, from the United Kingdom, Austria and Russia, focusing in particular on their implications for future challenges at Strasbourg from states where no means of formalising a same-sex union is available. Part 4 will analyse the potential implications of the Strasbourg jurisprudence for challenges to asymmetry of access in domestic courts, while Part 5 will consider the implications of creating symmetry of access by abolishing registered partnerships once same-sex marriage is introduced in a state.

1. Same-sex marriage and registered partnerships in the contracting states

It will be found below that equality-based arguments have strongly influenced the re-shaping of state recognition of same-sex relationships in a large number of the Member States. This article will attempt to do no more than present a brief sketch as to the position in the Member States as to formalised relationship statuses, a position that has changed with dramatic rapidity over the last decade, and is continuing to change.[7] A majority of the contracting states have now introduced same-sex registered partnerships,[8] while a number of the Western European contracting states have introduced same-sex marriage, predominantly over the last five years.[9] Among Eastern states, Croatia, Slovenia, the Czech Republic and Hungary have established registered partnership schemes for same-sex couples. Estonia also introduced such a scheme, but with coverage for both same and different-sex couples.[10]

When in a number of states registered partnerships acquired a well-established and recognised relationship status, their bans on same-sex marriage came under increasing pressure as creating discrimination against same-sex couples, given the discriminatory impact of the ghettoisation of formal relationships based on sexual orientation. Pressure to introduce same-sex marriage also arose when registered partnership schemes were not well-established or recognised so that the schemes were criticised as "consolation prizes".[11] Certain Member States—Denmark, Norway, Sweden, Iceland, Finland, Ireland and Germany—used to provide for registered partnerships in the case of same-sex unions, but they were phased out following the introduction of same-sex marriage.[12] But a number of Member States that introduced same-sex marriage also retained registered partnerships for both same and different-sex couples.[13]

In certain Eastern states Bills have been brought forward to introduce same-sex registered partnerships, but have not passed. In 2012 a registered partnership Bill was submitted to the Slovakian Parliament but was refused a second reading by a large majority[14]; however, public opposition to formal recognition of same-sex unions appears to be weakening.[15] In 2015 a Bill was put forward in Latvia to modify the Civil Code to provide for registered partnerships.[16] The proposed law would have allowed "any two persons" to register their partnership and thereby they would have acquired almost the same rights and obligations as married couples, but the proposal was rejected.[17] Bulgaria considered adding different-sex and same-sex couples to its Family Code in 2012 but has not so far done so. A package of proposed constitutional reforms is currently before the Ukrainian parliament and includes a proposal for same-sex unions,[18] but the proposal is opposed by the All-Ukrainian Council of Churches and Religious Organizations. In 2015 the Legal Committee of the Romanian Chamber of Deputies considered a legislative proposal aimed at legalising same-sex registered partnerships, the third proposal of that kind introduced in less than three***E.H.R.L.R. 547*** years, but it was rejected. Three draft laws on gender-neutral registered partnerships have been considered so far in the Polish legislature, but none have yet passed into law.[19]

Only one of these Eastern states has introduced same-sex marriage. Indeed, many of these states have amended their constitutions to ensure marriage is defined as a union between one man and one woman.[20] Slovenia's National Assembly passed a same-sex marriage Bill in March 2015, the first post-Communist state to do so, but the measure was not enforced since a civil society group backed by the Catholic Church, "Children Are At Stake", brought a challenge to it to Slovenia's highest court. The Court agreed with the challenge, overturning the law, and deciding that the measure must be the subject of a referendum scheduled for December 2015; by a majority Slovenians rejected the measure on the basis that it included same-sex adoption.[21] Thereafter the Bill was brought into law in February 2017, but without including provision for such adoption.

In terms of providing equal access to formal relationship statuses to same and different-sex couples, a number of conclusions can be drawn. A few states offer complete symmetry of access in the sense of providing equal availability of relationship statuses to same and different-sex couples: registered partnerships and marriage are open to both.[22] Somewhat more circumscribed symmetry of access is also apparent in those states which offer couples, regardless of sexual orientation,

availability of only one formalisation—marriage. Availability of marriage alone arguably creates greater detriment for same-sex couples than for different-sex ones since same-sex couples may have stronger objections to contracting marriage, a point pursued below; therefore a larger number of such couples may have no effective option open to them of formalising their relationship. Further, if registered partnerships are phased out, after some same-sex couples had already contracted them, those couples with ideological objections to contracting marriage would be left as a diminishing group of persons in a "legacy relationship".[23]

The majority of states provide asymmetry of access in four forms. First, and of most concern, in a number of Eastern states different-sex couples can choose to access marriage over cohabitation; same-sex couples have no such choice.[24] Second, and leaving aside the option of cohabitation, in a number of states different-sex couples can access marriage *or* a registered partnership, while same-sex couples can only access a registered partnership.[25] Third, in a small number of states—England and Wales,[26] and Scotland[27] —same-sex couples can access marriage or a registered partnership, while different-sex couples can only access marriage. Fourth, certain states offer the availability of marriage to different-sex partners and of a registered partnership to same-sex ones.[28] That stance could be referred to as providing partial symmetry of access, since only one option of formalisation is available to all couples, but, clearly, it does not provide in substance a satisfactory equality of access, given that the legal consequences and the civic benefits conferred by such partnerships do not necessarily mirror those available via contracting marriage, and marriage tends to be viewed as the more privileged status.[29] The extent to which the level of benefits accruing to persons in a registered partnership is similar to those accruing via marriage varies from state to state, and is beyond the scope of this article.[30] In some states such partnerships are viewed as an institution equal to marriage since, with a few exceptions, their legal consequences and the civic benefits conferred largely mirror those resulting from civil marriage,[31] and a partnership may be viewed as "marriage in all but name".[32] But in terms of the formalisation ceremony, the terminology used, and the treatment of the sexual relationship between the partners, a contradictory emphasis on creating differentiation between registered partnerships and marriage has sometimes emerged.[33]

The creation of asymmetry of access in states in the first sense is clearly of the greatest concern since it obviously means that same-sex couples who wish to formalise their relationship are denied the civic benefits and recognition inherent in such formalisation. It also strongly reinforces cultural acceptance of homophobia and the notion that homophobia should be accorded legal recognition. But the other failures to create symmetry of access mean that inequality is also perpetuated in other respects, most obviously where both same and different-sex couples can access a registered partnership, but only different-sex couples can access marriage. Not only is equality of access denied to same-sex couples, but the level of civic benefits may be lower as well. Since it can hardly be doubted that couples suffer the most severe form of discrimination if unable to access any form of formalisation of their union, this article turns to consider the likelihood of a challenge to that position succeeding at Strasbourg. But it also considers, more generally, the Strasbourg position so far on the creation of asymmetry of access to relationship statuses.

2. Addressing forms of asymmetry of access at Strasbourg

2.1 Strasbourg self-restraint due to the doctrine of subsidiarity

The Strasbourg "family life" jurisprudence is permeated by an acceptance that if couples fall within the category of the "family" that can and should lead to conferment of some societal benefits, and also that formalisation of the "family" relationship would tend to carry with it an enhanced level of benefits, so such formalisation should not be withheld on the ground of sexual orientation. Reliance on discerning a consensus in the contracting states as to formalisation of relationships is a marked feature of the Strasbourg***E.H.R.L.R. 549*** jurisprudence[34] bearing on same-sex marriage and registered partnerships[35] and affecting the width of the margin of appreciation granted to the state.[36] In turn its width determines the level of scrutiny deployed in the proportionality analysis, so the use of consensus analysis is of particular pertinence in relation to claims of discrimination under art.14,[37] especially relevant in this context: if a form of consensus on the matter can be discerned, then it has been accepted under art.14 that especially weighty reasons must be advanced,[38] justifying the measure creating differentiation if certain grounds of discrimination are at stake, including sexual orientation and gender.[39] Clearly, this cautious approach to exercising its living instrument tradition in this context is linked to the Court's position as a regional guardian of human rights without (in practice) coercive legal powers, meaning that it inevitably relies on subsidiarity-related devices, especially in contested social contexts.

2.2 Recognising the value of state formalisation of relationships

Strasbourg accepted in *X and Y v United Kingdom* [40] that once a relationship could be identified as a representing a form of "family life"—in that instance in respect of different-sex cohabitants—a state would be entitled to accord it greater protection; the Commission further decided that a state was entitled to decide to afford particular assistance to "traditional" families. The Court then extended the category of relationships that could fall within the term "family" in *Schalk and Kopf*,[41] noting that so far its case-law under art.8 had only accepted that the "emotional and sexual relationship" of a same-sex couple would constitute "*private* life", but it had not found that it would constitute "family life".[42] But given that recently a rapid evolution in the concept of "family" in Member States had occurred, and bearing certain EU Directives relating to the family in mind, the Court found that the "relationship of the applicants, as a cohabiting same sex couple living in a stable de facto partnership, would fall within the notion of 'family life', just as the relationship of a different sex couple in the same situation would"[43] since the applicant couple was in a relevantly similar situation to a different-sex couple as regards their need for "legal recognition and protection of their relationship".[44] It is notable that in so finding the Court did not require the couple to point to a specific detriment that had accrued to them, or was likely to accrue, due to the***E.H.R.L.R. 550*** lack of formal recognition of their relationship as a "family" in terms of loss of civic benefits or of formal signalling of their relationship status.

Schalk can readily be characterised as a challenge based on the asymmetry of access to relationship statuses available to same and different-sex couples in Austria at the time. The main complaint in *Schalk* under arts 12 or 8 read with art.14 was as to the inability of the same-sex partners to access marriage,[45] but that argument was rejected

on the basis of the lack of consensus as to same-sex marriage in the contracting states, meaning that the decision to bar same-sex couples from marriage fell within Austria's margin of appreciation. The applicants in *Schalk* also raised the issue of differences between a marriage and a registered partnership, arguing that such partnerships did not provide the same level of civic benefits and recognition as did marriage.[46] That argument was rejected under art.14 read with art.8 on the basis that registered partnerships offered a level of protection which was found to fall within the state's margin of appreciation, given the trend in Europe to accord benefits to registered partnerships differing only slightly, aside from parental rights, from those available for marriages.[47]

Relying on the step taken in *Schalk*, the applicant couples in *Vallianatos v Greece*,[48] who were in stable same-sex relationships, relied on art.8 read with art.14 to challenge their exclusion in Greece from civil unions which were only available to different-sex couples. A strong version of asymmetry of access had been created, given that different-sex couples in Greece could choose marriage or a registered partnership; *both* options were denied to same- sex couples. The Court's analysis of the European consensus found that an evolving or "minority" consensus was currently emerging with regard to the introduction of forms of legal recognition of same-sex relationships, in the sense that where contracting states did authorise a form of registered partnership other than marriage only two states had reserved it exclusively to different-sex couples.[49] Thus a narrow margin of appreciation only was accorded to Greece. The Court found that the applicants' relationships would fall within the notions of both "private" and "family" life under art.8(1), and found that art.14 applied[50] since the applicants were in a comparable situation to different-sex couples as regards "their need for legal recognition and protection of their relationship"—as established in *Schalk*.[51] In determining whether the situation of the applicants fell within the ambit of art.8, the Court made no reference to detriment accruing to them due to their exclusion from the civil union scheme, but merely reiterated the points made in *Schalk* as to the ability of same-sex couples like different-sex ones, to enjoy "family life". While the key point established in *Vallianatos* was clearly that a state that excludes same-sex couples from an existing civil union scheme will be found to have discriminated against them on grounds of sexual orientation, the Court also emphasised the recognition value of any such scheme,[52] implying that formal recognition in itself conferred a benefit.[53] Obviously the Grand Chamber was addressing a situation in which no formal recognition at all for their relationships was available in Greece, so it did not have to address the question of the *nature* of the recognition or of choice over it.***E.H.R.L.R. 551***

The seminal decision in *Oliari v Italy* [54] went one step further than the Court had done in *Vallianatos*: it was the first case to establish that failure to afford couples constituting family life access to a statutory framework offering recognition and protection of their relationship could lead to a breach of art.8 on grounds of disproportionality, where the only scheme available offering such benefits was marriage, open only to heterosexual couples. So, clearly, it differed from *Vallianatos* which concerned exclusion from an existing registered partnership scheme. The Court referred to a "thin majority" of Member States (24 out of 47) that had by 2015 already legislated to introduce forms of same-sex registered partnership; therefore the margin of appreciation conceded was narrow. It found that cohabitation agreements, which appeared to be available to same-sex couples were designed only

to provide certain rights to people who lived together, including flatmates, and were not intended explicitly to provide any legal rights aimed at couples.[55]

In finding a breach of art.8 the Court noted that the Italian courts had found that same-sex unions should be protected as a form of social community under art.2 of the Italian Constitution and, in relation to Italy's positive obligations, that there was "a conflict between the social reality of the applicants, who for the most part live their relationship openly in Italy, and the law, which gives them no official recognition".[56] Thus, while recognising a positive obligation on states to introduce same-sex registered partnerships under art.8 of the ECHR [57] the Court sought to relate its scope to circumstances arising locally, in Italy, and most likely to arise in Western European states. Further, while according value to such partnerships, it also accepted the continuance of asymmetry of access: it declared the claim of the couple to a same-sex marriage under art.12 inadmissible,[58] clearly signalling that it would not recognise a right to such marriage until the consensus on the matter had strengthened considerably, and the Court refused to accept a form of minority consensus.[59]

Since argument concentrated on Italy's positive obligations under art.8, the Court, having found a breach, declined to consider the matter separately under art.14. In contrast, in *Taddeucci v Italy* [60] where a partner of a same-sex couple, a non-EU citizen, would have been able to remain in Italy if able to marry his partner, a breach of art.14 read with art.8 was found, recognising the discriminatory dimension of the detriment caused to him.

2.3 Accepting asymmetry of access to formal relationship statuses

Acceptance of asymmetry of access was impliedly apparent in *Hämäläinen v Finland* [61] in a somewhat different context, concerning a transsexual applicant; the case turned on the question whether there was a positive obligation under art.12 or art.8(1) to introduce same-sex marriage, bearing in mind that the applicant wanted full recognition of her new gender and continuance of her marriage. A form of formalisation of her relationship was available—a registered partnership—but accessing that status involved relinquishing her marriage, and she objected to so doing on religious grounds. On that basis no such obligation was found since the state was found to have remained within its margin of appreciation in requiring transsexuals whose marriage had become a same-sex one after gender reassignment, to relinquish it.***E.H.R.L.R. 552*** [62]

While the Court has accepted in this jurisprudence that providing state recognition for a relationship by according it a formal means of expression may be required by art.8, it has not accepted that the choice of the form of the recognition is significant: the Court has made it clear that if a couple can already choose one recognised form of formalised relationship aimed specifically at couples in a committed relationship, a state will not be in breach of art.8, either read alone or with art.14, if it does not allow them to choose another form.[63] The form of recognition that has been sought by a number of same-sex couples in the decisions discussed is marriage, and the Court has consistently opposed accepting that a right to same-sex marriage arises under arts 8 or 12 read with art.14, or alone[64] on the basis of the particular, culturally specific, nature of marriage[65]and, as mentioned, on grounds of consensus analysis influencing the width of the margin of appreciation. Although post-*Oliari* the consensus is continuing

to strengthen, it remains a trend/minority consensus, which the Court refused to accept as able to narrow the margin in *Oliari*.

The decisions discussed leaving undisturbed the exclusion of same-sex couples from marriage in certain states were taken in the context of the "deep-rooted social and cultural connotations [of marriage] which may differ largely from one society to another",[66] leading the Court to prefer to find that a formalised union could be made available to applicants under art.8 in the form of less culturally specific registered partnerships. Therefore, those decisions did not address the *value* of making a choice available as to the recognised public expression of the union. The Strasbourg cases discussed, in particular *Schalk* and *Oliari*, support the conclusion that at present so long as one method of formalisation of a same-sex or different-sex union is made available to couples by the state, which is targeted specifically at couples in a sexual relationship, and is not merely of symbolic value, the state's positive obligations under art.8 read alone or with art.14 would be likely to be found to be fulfilled, in the sense that the state in question would therefore be deemed to have remained within its margin of appreciation. The fact that couples are not allowed access to one of the methods on grounds of sexual orientation is not deemed to be discriminatory, even where there are significant differences between the two.

3. Directly challenging asymmetry of access to formal relationship statuses under the ECHR

3.1 The strengthening consensus on the introduction of same-sex registered partnerships and marriage

Given that post-*Oliari* the introduction of same-sex marriage/registered partnerships will continue to grow in Europe, and states that have introduced those statuses will soon be in a clearer majority, it would be expected that the Court's analysis of the consensus would change in future. As further states move towards rejecting asymmetry of access, and either phase out registered partnerships, or potentially open them to different-sex couples after introducing same-sex marriage, the consensus as to creating symmetry of access in Council of Europe states will strengthen. Although the Court in the decisions discussed has acquiesced in accepting asymmetry of access to formalisation of relationships where registered partnerships *are* available to same-sex couples, if a consensus builds in the contracting states to the effect that creating or maintaining such asymmetry is unacceptable, the Court would eventually come under pressure to accept that it creates discrimination against same-sex couples, since weighty reasons would then have to be adduced to justify the differentiation. As a result, the Court will eventually come under greater pressure to oblige individual states to introduce same-sex registered partnerships even where local social acceptance of such partnerships is not apparent. In respect of same-sex marriage, the margin of appreciation accorded to individual states may also eventually narrow.[67]

Given the Court's current stance in refusing to acknowledge a right to same-sex marriage under the ECHR, reliance on arts 8 and 14 to prompt a state to open marriage to same-sex couples would fail at present at Strasbourg, and probably also in domestic courts, under those articles or their domestic equivalents, although the chances of a successful claim domestically in certain states could be higher, a point

pursued below. Therefore, addressing asymmetry of access to formalisation of relationships as between same and different-sex couples by way of the introduction of same-sex marriage in a number of contracting states has occurred instead via legislation, and that may continue to be the case in future. However, litigation is now arising in certain Member States, relying on the Strasbourg jurisprudence discussed, challenging such asymmetry of access but, in two instances discussed below, based on challenges brought by different-sex couples. As discussed further below, such litigation arguably has merit on its own terms, but it could also be seen in effect as a proxy for a direct challenge to the exclusion of same-sex couples from marriage in particular states, given that it relies on seeking to eliminate acceptance of discrimination based on sexual orientation as determinative of access to formal relationship statuses. In the third instance the challenge is to the complete exclusion of same-sex couples from a means of formalising their union.

3.2 Asymmetry of access in England and Wales: Steinfeld

The anomalous situation that has arisen in England and Wales[68] whereby same-sex couples can access marriage or a civil partnership, but different-sex ones in the same position can only access marriage, gave rise to the challenge in *Steinfeld* by the two claimants, a couple in a committed long-term heterosexual relationship, with a child. They are challenging their exclusion from the choice of a civil partnership,[69] since they are barred, as a different-sex couple, from entering that status under the Civil Partnership Act 2004.[70] The claimants were seeking to formalise their relationship, but did not want to marry due their strong ideological objections to the institution of marriage, on the basis of their view that it is imbued with historical patriarchal trappings. They view the civil partnership status as a formalisation of their relationship which reflects their values and recognises the equality of their relationship. In pursuit of their claim they sought to rely on arts 8 and 14 of the ECHR in the High Court[71] and then in the Court of Appeal, under the Human Rights Act, basing their claim on a number of the Strasbourg decisions discussed, and arguing that they are being discriminated against under art.14 on grounds of their sexual orientation since a same-sex couple could choose to contract marriage under the Marriage (Same Sex Couples) Act 2013, but would also have the choice of entering a civil partnership.

The Court of Appeal found unanimously, relying on *Oliari*, that the barrier to access of different-sex couples to civil partnerships fell within the ambit of art.8.[72] Lady Justice Arden noted that in *Oliari* the Strasbourg Court had "specifically rejected the argument that … the applicants had to show that they***E.H.R.L.R. 554*** suffered any loss as a result of not being able to enter a civil union"[73] in order to fall within that ambit.[74] Clearly, the applicants in *Oliari* had suffered detriment—but that was not part of the *ambit* argument. The Court, taking account of *Vallianatos* as to ambit, also rejected the argument that the availability of marriage to the applicants would take them outside that ambit, finding that the Strasbourg Court would equally reject the "can marry" submission on the basis that marriage would not be "an effective option for them", given their settled beliefs.[75]

Once the situation was found to fall within the ambit of the "family life" head of art.8(1), art.14 was also engaged. Therefore the Court had to consider whether the differentiation between same and different-sex couples—the asymmetry of access

created—could be justified. The Court accepted that if the differential treatment was on grounds of sexual orientation or gender—then, following *Schalk* (and *Vallianatos* with a range of other decisions, including *Karner v Austria*,[76] *Hämäläinen v Finland*), weighty reasons would be needed to justify it. The standard to be applied in considering justification was found to be that of strict scrutiny, even if at Strasbourg a wide margin of appreciation would have been granted to the state.[77] (Possibly it would not in any event have been wide since England and Wales are outliers in Europe, given that most other states do not create the same form of asymmetry of access between couples.) The Secretary of State's aim was to wait to see what the impact of the introduction of same-sex marriage would be on civil partnerships; the measure taken to further it was to continue to exclude different-sex couples from civil partnerships without giving the appellants (and other couples in their position) any means of knowing "when their state of uncertainty as to formalisation of their relationship might end".[78] Lady Justice Arden found under strict scrutiny that the justification given failed the test of proportionality.[79]

Lord Justice Beatson and Lord Justice Briggs, however, both came to the conclusion, even under strict scrutiny, that the "wait and see" policy justified the potential discrimination under art.14 on the basis that a change should not be made prematurely—that is, by extending civil partnerships to different-sex couples, which might have to be reversed, wasting time and effort.[80] Lord Justice Beatson found that resolution of the position was complex and would need time to resolve.[81] He did, however, consider that while the Court should not micro-manage areas of social policy, and therefore a deadline for eliminating the discrimination by taking one of the available options should not be set, there would come a point at which a court would not accept that the "wait and see" policy remained justifiable. Lord Justice Briggs agreed.[82]

It is argued that the majority in the Court of Appeal erred in finding that there were weighty reasons which could justify the differentiation. In *Vallianatos* the demand for weighty reasons meant that proportionality demands under art.14 were not found to require merely that the measure chosen was *in principle* suitable to achieve the aim in question (protecting heterosexual unions outside marriage): it also had to be shown to be necessary to achieve that aim to exclude same-sex couples from the category of registered partnerships. It was found in *Taddeucci v Italy* [83] that that was particularly the case "where rights falling within the scope of Article 8 are concerned".

If the Government's aim was to obtain time to consider the future of civil partnerships, the measure taken could not be said to have been "necessary" to achieve it since it would have been possible to allow different-sex couples access to civil partnerships while consulting as to their future. At the least, it could not be said to have been necessary to offer no timetable regarding the consultation, as Lady Justice Arden***E.H.R.L.R. 555*** pointed out. On that basis, the difference of treatment could have been found to be unjustified and therefore discriminatory under art.14. Thus, in a move which would outpace Strasbourg on this matter,[84] a breach of art.8 read with art.14 could be found when the case reaches the Supreme Court, which would probably lead to a declaration of the incompatibility between those articles and ss.1 and 3(1)(a) of the Civil Partnership Act 2004,[85] meaning that the government might take the option of opening civil partnerships to different-sex couples, although it could possibly also abolish them completely, as discussed below.

3.3 Asymmetry of access in Austria: Ratzenböck and Seydl

Strasbourg has very recently decided on a similar case, also brought by a different-sex couple denied access to a registered partnership—*Helga Ratzenböck and Martin Seydl v Austria*.[86] Such partnerships were introduced in Austria in 2010, but confined to same-sex couples, while same-sex marriage has not yet been introduced.[87] Thus the differentiation does not arise on the basis that a same-sex couple would have two options as to choice of relationship status while a different-sex couple would only have one, but rather because the couple is being denied the option, purely on the grounds of sexual orientation, of entering a particular formal relationship status (the fourth form of asymmetry of access delineated above). That status is the only effective option for them, given their ideological objection to marriage. Like Steinfeld and Keidan, the couple in question have a child and are in a committed relationship, but do not want to marry.

Ratzenböck and Seydl consider that a registered partnership would suit and express their relationship much more readily than would marriage. That is partly because in Austria registered partnerships entail shorter waiting-periods for dissolution than are available for divorce; there is no obligation for the partners to be monogamous; instead there is a duty to commit to a comprehensive relationship of trust. There are, however, numerous instances of discrimination against registered as opposed to married partners, relating to the care for children. But other considerations outweigh that one.

The couple lodged an application to enter into a registered partnership pursuant to the Registered Partnership Act (Eingetragene Partnerschaft-Gesetz), arguing that limiting the application of this law to same-sex couples violated their constitutional right to be treated equally before the law, pursuant to art.2 of the Basic Law (Staatsgrundgesetz), art.7 of the Federal Constitution (Bundes-Verfassungsgesetz), arts 12, 8 and 14 of the ECHR, and art.21 of the EU Charter of Fundamental Rights. The Austrian Constitutional Court dismissed their claim.[88] It reiterated that art.12 of the ECHR had been found to apply only to the traditional civil marriage between a woman and a man. Since Strasbourg in *Schalk* had held that there currently was no consensus among the Member States concerning marriage for same-sex couples, and that issue therefore fell within the margin of appreciation left to the Member States, that must, it found, be even more clearly the case in respect of the question of access of different-sex couples to a registered partnership, since only a very small number of Member States made such provision.

Pursuant to the jurisprudence of the Court, it was noted that in general very weighty reasons had to be brought forward in order to justify a difference in treatment based on gender or sexual orientation. However,***E.H.R.L.R. 556*** in *Schalk* the Court had held that the legislator was allowed to limit civil marriage to different-sex couples, because the state would dispose of a certain margin of appreciation concerning the exact status to accord to an alternative institution applicable to same-sex couples, and had indicated that that margin would apply to a state decision to create asymmetry of access to formal relationship statuses as between same and different-sex couples. The Constitutional Court therefore concluded that art.8 read with art.14 did not grant the couple a right to conclude a registered partnership. That was partly on the basis of a

lack of a European consensus on the matter of opening registered partnerships to different-sex couples. But the Court also took into account the fact that the institution of civil marriage was open to such couples, who were not part of an historically disadvantaged, vulnerable, discriminated-against group, while the institution of the registered partnership was created in order to counteract discrimination against same-sex couples.

The couple brought their claim to Strasbourg, under arts 8 and 14, supported by *Rechtskomitee LAMBDA (RKL)*, Austria's LGBT civil rights organisation. But in a fairly short judgment the Court, by five to two, found no breach of Article 14 read with 8, on the basis that, since they could marry, the applicants were not in a comparable situation to same-sex couples who had no right to marry in Austria and needed the registered partnership as an alternative means of providing legal recognition to their relationship. Thus the claim failed at the first hurdle under Article 14: since no comparator was found, the Court did not need to assess the difference of treatment or the justification for the difference.

The Court did not state that the need—accepted by the Austrian Constitutional Court—to be part of an historically disadvantaged group to attract strict scrutiny was required. It could have been noted that in any event, partly due to the patriarchal associations of marriage, their claim related to a rejection of a historical association between repression of women and marriage,[89] and possibly to current discrimination against wives in Austria.

Consensus analysis did not play a part in the ruling of the majority given that the claim failed at the comparator stage. If the question had been asked whether, where states had introduced same-sex registered partnerships, they had then maintained asymmetry of access as between different and same-sex couples in the fourth sense considered above, the answer would have been that such asymmetry was not usually maintained since in a majority of such states same-sex marriage was then introduced (and registered partnerships were usually phased out). A determination as to the width of the margin would have depended on the framing of the question as to consensus. Under strict scrutiny Austria's justification for confining different-sex couples to one relationship status might not have been accepted. But the Court avoided that possibility because, it is argued, it could have encouraged, not only the opening of registered partnerships to different-sex couples in Austria, but eventually further challenges to bars to same-sex marriage in and from various member states.

The decision failed to challenge the Court's previous acceptance of creating segregation based on sexual orientation by corralling same-sex couples into the registered partnership ghetto, and different-sex couples into the civil marriage one. Had a breach of Article 14 read with 8 been found, and Austria had responded by opening registered partnerships to different-sex couples, the asymmetry of access to formalised relationship statuses in Austria as between same and different-sex couples would obviously have been exacerbated, placing same-sex couples in an even more disadvantaged position than was previously the case, a matter that the Court adverted to. However, in practice, given that the Court would then have rejected acceptance of such segregation, pressure would have been placed on Austria to open marriage to same-sex couples. The Court's attempts at reform in this context have, as this decision confirms, been confined, albeit hesitantly, to addressing the situation of same-sex

couples who have no access to any means of formalising their relationship. In other words, it is prepared at present to accept asymmetry of ***E.H.R.L.R. 557*** access in the fourth sense designated above as less pernicious in arts 14 and 8 terms than asymmetry in its first and most concerning sense. So doing also protects its own legitimacy.

3.4 Asymmetry of access in Russia: Fedotova

The implications of *Oliari* and *Vallianatos* may soon be considered in the context of a strengthened consensus on this matter, in *Fedotova v Russia*.[90] Three same-sex couples are claiming a right to same-sex marriage in Russia, on the basis that only one form of formalisation of relationships is available in Russia—marriage—which is not open to same-sex couples. All three couples have declared their intention to marry and have applied unsuccessfully on a number of occasions to the Register Office locally to have their marriages registered. The requests were dismissed by reference to art.1 of the Russian Family Code, which states that the regulation of family relationships is based on "the principle of a voluntary marital union between a man and a woman". Their challenges to the Register Office's decisions in the domestic courts were unsuccessful.

The Strasbourg Court appears to be considering their claim under arts 8 and 14 only, not under art.12, and it is viewing it as a claim for some means of formalising their relationships in Russia via a form of registered partnership. The couples in *Fedotova* are not only subject to the most pernicious form of asymmetry of access identified above, but are also clearly in a particularly invidious position, given the context of state-based and social acceptance of homophobia potentially affecting their claim. Given that the Court in *Oliari* referred to a discordance between social reality in Italy and the legal position as to formalisation of a same-sex union as determinative of the reach of positive obligations under art.8, it accorded to itself the possibility, where such discordance did not exist, or did not exist to the same extent in a Member State, of avoiding a finding that the article had been breached. But by the time the case reaches the Court a stronger consensus as to providing access to same-sex registered partnerships in Member States, and as to rejecting asymmetry of access generally, will be apparent (and the consensus would be stronger if *Steinfeld* has been successful, and given the introduction of same-sex marriage in further member states by that point). In the face of a stronger consensus, the question would be whether the positive obligation recognised under art.8 in *Oliari* [91] could under fundamental ECHR principles be confined to the particular conditions operating in Italy,[92] or whether it must be extended to Member States where those conditions—principally social acceptance of same-sex registered partnerships—do not operate. That appears to be the case in Russia. Failing to extend the obligation would mean in effect bowing to majoritarian opinion in order to deny a minority access to Convention rights.

Further, the Court might be prepared to accept that the claim had a discriminatory aspect as in *Taddeucci*. If the Court was prepared to find that the situation fell within the ambit of art.8, art.14 would be engaged. Consensus analysis would then have a clearer role; assuming that the margin afforded would therefore be narrower than when *Oliari* was decided, the scrutiny under art.14 would be strict. The Court would therefore have less leeway to avoid finding a breach of art.14 read with art.8 in respect of Russia, especially since, as has been pointed out by the Court previously

(in, for example, *Alekseyev v Russia*), the exercise of Convention rights by a minority cannot depend on their acceptance by the majority.***E.H.R.L.R. 558*** [93]

3.5 The potential impact of these challenges

It can be seen that the stances of the Court of Appeal in England and of the Austrian Constitutional Court differed as to the role of the margin of appreciation doctrine domestically, since the English court found that it was inapplicable, meaning that strict scrutiny of the justification for the differentiation put forward was undertaken. The outcomes of the two claims would also lead to somewhat differing impacts in the two states if ultimately they are successful at Strasbourg (or in the UK Supreme Court). In England and Wales, if the claim eventually succeeds, it will confirm that discrimination in respect of relationship statuses based on sexual orientation cannot be condoned. Assuming that the government responds to a s.4 HRA declaration, by opening civil partnerships to different-sex couples, they, at least on a superficial analysis, would be the beneficiaries, but any remaining discrimination in the provision of civic benefits linked to such statuses would come under increased pressure, potentially benefiting same-sex couples also. More significantly, the decision would represent a denial that creating asymmetry of access on grounds of sexual orientation can be non-discriminatory, and would shore up the nature of the registered partnership model among Council of Europe states as an accepted and established method of formalising a relationship, potentially of benefit to same-sex couples in other contracting states, as discussed further below.

The same effect would have been expected to arise in Austria if the claim in *Ratzenböck* had been successful at Strasbourg.[94] But, more significantly, the campaign for equal access to formal relationship statuses would have been strongly bolstered, meaning that pressure to introduce same-sex marriage in Austria would be significantly increased. The outcome would have tended to undermine the appeal of the stance of the Conservative party in Austria, which reportedly disapproves of "marriage-lite" for different-sex couples as much or more than it disapproves of same-sex marriage.[95]

If the challenge in *Fedotova* is successful, it will become the leading decision on a right to a same-sex registered partnership under the ECHR, of more significance than *Oliari*, since it would not rest on recognition of a positive obligation under art.8 that is potentially limited in scope. Russia would be likely to be slow to implement the ruling, but it would place pressure on those Eastern states maintaining the first, most pernicious and discriminatory form of asymmetry of access to formal relationship statuses. Where such states have already introduced Bills to introduce such partnerships, which have not been passed into law, encouragement to revisit them would be created. Eventually only an incrementally diminishing small number of contracting states might continue to maintain that form of asymmetry.

4. Future successful challenges to asymmetry of access in domestic courts under the ECHR/constitutional rights' guarantees?

4.1 Less constraint in domestic courts?

The possibility arises that art.8 read alone or with art.14 (or their domestic equivalents) might be more likely in certain states than at Strasbourg to be found to be breached domestically in respect of the four forms of asymmetry of access considered above. A same-sex couple could rely on those articles to challenge their exclusion from marriage or from any form of formalisation of their union in their own state. Clearly, a number of such actions have already arisen, as in, for example, the Italian litigation preceding the decision in *Oliari*, or the Russian litigation preceding *Fedotova v Russia*. As new challenges arise, on *Steinfeld* lines, but brought by same-sex couples, domestic courts, if prepared to subject the state justification to***E.H.R.L.R. 559*** strict scrutiny, as occurred in *Steinfeld*, might not be prepared to accept that the demands of proportionality had been satisfied by claims that, for example, offering marriage only to different-sex couples could be justified on the basis of a need to protect traditional marriage.[96] Successful action in domestic courts, finding that registered partnerships should be opened to same-sex couples or introduced, as in *Vallianatos* or *Oliari*, even if it does not lead to change in the state in question, is a factor the Strasbourg Court will take into account, as it expressly did in *Oliari* as relevant to finding a breach of art.8.[97]

As far as the Supreme/Constitutional Courts in various states are concerned, it should not necessarily be relevant that a state might be found to be within its margin at Strasbourg (due to consensus analysis) in maintaining such asymmetry. Such Courts might find, as Baroness Hale found in the UK case of *Re P*, that "if the matter is within the margin of appreciation which Strasbourg would allow to us, then we have to form our own judgment".[98] Clearly, the reception and status of the ECHR in domestic courts varies greatly as between the various Member States, and discussion of it is outside the scope of this article.[99] But the margin of appreciation doctrine as an international law doctrine clearly has no place in domestic jurisprudence, except indirectly, as giving a domestic court greater leeway to decide on the scope and meaning of a Convention right—or its domestic equivalent—where the matter would be found by the Strasbourg Court to lie within the particular state's margin. Domestic courts in the Member States are or could be less constrained than Strasbourg since obviously they are not affected by the subsidiarity doctrine and the policy-based need to exercise self-restraint on the basis of the possibility that their judgments might be disregarded in other Member States. Domestic courts can more readily take account of the *principled* basis for extending marriage to same-sex couples or the case for introducing or extending registered partnerships to same-sex couples, in terms of the value of offering an equal choice of forms of formalisation of the relationship to couples.

Rights' protection in certain (mainly Western) Member States in this context has already arisen via legislation, as discussed, and has already out-paced Strasbourg. But in so far as challenges to asymmetry of access are currently arising in domestic courts,[100] and are relying on the jurisprudence of the Strasbourg Court, such courts also have the opportunity to outpace Strasbourg in creating a domestic fusion of family law and human rights values that demonstrates a more substantive understanding of the value of according equality of access to formal relationship statuses. In other words, when Strasbourg concepts are deployed domestically in Member States, they could be untrammelled by Strasbourg subsidiarity-based restraint, based partly on analysis of the consensus among the contracting states on the issue.

4.2 More value-laden judgments in domestic courts?

At Strasbourg, in both *Vallianatos* and *Oliari*, the dignity-based argument found some recognition in the finding that formal civil unions have an "intrinsic value" for persons in the applicants' position, even ***E.H.R.L.R. 560*** regardless of the legal effects they produce.[101] But there has been a refusal to accept that disallowing an applicant in a relationship constituting "family life" to access marriage assails the dignity of a group if they are denied access to an institution providing a particular status, and of a high recognition value. If, as Bamforth argues in the context of defending formalisation of same-sex unions, there is a "dependence of equality on deeper values"[102] then such values are clearly at stake in respect of creation of asymmetry of access to the detriment of same-sex couples. Protection for dignity has been found to underlie art.8 as an aspect of the "very essence of the Convention",[103] while dignity has been found to form "the foundation of all the freedoms" protected by international human rights law[104]; it has been linked by the US Supreme Court to the obligation of the state not to deny marriage to a couple on the basis of sexual orientation.[105]

The extent to which dignity is at stake in the context of extending civil partnerships to different-sex couples is perhaps more contestable,[106] but the suggestion that dignity is undermined by denial of a choice as to partnership status on grounds of sexual orientation, even outside a general context of inequality, finds support from a range of sources.[107] Even where the furtherance of equality is not part of a general drive to protect a discriminated-against minority group, those deeper values may still be at stake. Denying same-sex couples a right to marry, and confining them to the option of entering a registered partnership, assails their dignity by denying them a choice as to such status purely on grounds of their sexual orientation. The link to identity under art.8 receives some support from *Mikuli? v Croatia* [108]: "[private life] can sometimes embrace aspects of an individual's physical and social identity" and from *Goodwin v United Kingdom* in which art.8 was interpreted as protecting persons in establishing their "identity as individual human beings",[109] in that case via official recognition of their new gender. A similar argument could be applied to the expression of the values held dear by a different-sex couple via the significant matter of the formal signalling of the nature of their relationship to others. The ability to express their identity as a couple via a non-inimical formalisation of the relationship thus not only provides civic benefits, but accords it a particular recognition, aligned with their beliefs.

It is argued that the values of dignity, equality and identity are at stake when a couple on grounds of sexual orientation has open to them only one formal relationship status inimical to them, or, most significantly, is denied access to any formalisation of the relationship on those grounds. In principle, the "intrinsic value" of such formalisation is diminished where that status does not express their identity as a couple in terms of the way they present themselves to others. *Goodwin*, among other decisions, can be taken to indicate that the notion of protecting identity and gaining official recognition of a chosen identity is central under art.8(1).***E.H.R.L.R. 561*** [110]

4.3 Nature of domestic challenges

If it was found domestically that the state did have an obligation to ensure symmetry of access as to formalisation of their relationship to same and different-sex couples under art.8, then under art.14 (or the domestic equivalents of these rights) the first test in the proportionality analysis would be to consider whether the means employed to pursue a legitimate aim appeared to be rationally connected to it or suitable to achieve it. Suitability of the means deployed in relation to the aim is also linked to the next stage in the analysis—choosing the measure to advance the aim which would create the least possible impairment of the rights interest, while serving more effectively to advance the aim. Extension of marriage to a same-sex couple or, as a first step towards symmetry of access, the introduction of registered partnerships for such a couple, or the opening of such partnerships to a different-sex couple, would appear to satisfy the demands of proportionality. Conversely, adoption of a "wait and see" approach (e.g. where a state was considering introducing same-sex marriage but had been very slow to take any positive steps towards it), or reliance on the value of maintenance of the status quo without a clear basis, other than an imprecise notion of defending "traditional marriage", would provide measures that would allow a non-minimal invasion of the rights' interest in question, probably for lengthy or indefinite periods. Scrutiny could be strict on the basis that most states now do not create full asymmetry of access, in the first sense discussed above. States could, however, achieve symmetry of access for couples by abolishing registered partnerships after same-sex marriage is introduced, as a number of them have done, the issue to which this article now turns.

5 The detrimental impacts on same-sex couples of abolition of registered partnerships

States must determine whether to abolish registered partnerships in the face of the introduction of same-sex marriage, or to introduce such partnerships as well as same-sex marriage so as to provide two options to couples, regardless of sexual orientation.[111] A number of states have taken the option of merely abolishing registered/civil partnerships completely once same-sex marriage is introduced.[112] However, it need not be assumed that marriage is *universally* perceived to be the "gold standard" for formalisation of unions[113]; after the introduction of same-sex marriage in Member States, registered partnerships can still have a future as a means significant in their own right of effecting the public expression of a relationship, rather than being viewed as a mere stepping-stone to such marriage.[114]

5.1 The intrinsic value of registered partnerships

The points made above in relation to *Steinfeld* as to the detrimental impact on different-sex couples ideologically opposed to marriage of their inability to choose the registered/civil partnership status would also apply to same-sex couples who are equally opposed, if that ability was abolished.[115] Indeed, it is argued that the detrimental impact might be greater. The position would be that some same and different-sex couples would continue to seek state formalisation and recognition of their relationship with the civic benefits thereby accruing, but would reject the marriage status as non-reflective of their relationship due to its patriarchal associations. But some same-sex couples might *also* view it as an institution reflective of heteronormativity and heterosexual mores.[116] Abolition would mean that such couples would be denied state formalisation of their relationship on the basis of an

(arguably) *more* deeply rooted ideological objection to marriage. But, conversely, if heterosexual couples enter a relationship status designed in effect for same-sex couples both are choosing a status non-modelled on heterosexual gender-based roles.
The evidence from England and Wales is that civil partnerships are valued, particularly as a significant proportion of same-sex civil partners have not taken the option, available to them since December 2014, of conversion of their civil partnership to marriage.[117] Further, same-sex partners wishing to enter a formal relationship status have not, since 2014, overwhelmingly opted for marriage.[118] In other states in which same-sex marriage became available, same-sex couples did not overwhelmingly opt for marriage,[119] and there is some evidence that this is especially true of older same-sex-couples, which[120] may be attributable to the fact that their longer experience of legalised homophobia has created from their perspective an association between marriage and contempt for same-sex relations[121] they find harder to overcome than do younger same-sex couples. In states in which different-sex couples are able to choose registered partnerships or marriage, a large number of them opt for registered partnerships.[122]

5.2 The impact of abolition on existing registered partners

Abolition would also have a strongly adverse impact on same-sex (and different-sex) couples already in a registered/civil partnership since their relationship status would then appear to have a diminished validity. Assuming that a number of them maintained their partnerships, after abolition they would become part of a steadily diminishing and, it is argued, ghettoised, group in a "legacy" relationship.[123] Some partners would therefore decide to convert to marriage, but there would be an element of state coercion to do so involved if they would not have chosen conversion otherwise—and, as mentioned above, it appears that a number of them would not have done so.

Conclusions

Strasbourg has gone so far as to recognise that rights-violations can arise if same-sex couples cannot access any form of formal relationship framework offering civic benefits broadly comparable to those offered by contracting marriage, although it has sought to place qualifications on that acceptance, based on local conditions, to be tested in *Fedotova v Russia*. It has therefore contemplated acceptance of the most pernicious and discriminatory form of asymmetry of access as to access to a formal relationship status available in the contracting states. It has also accepted that establishing partial symmetry of access in states (registered partnerships for same-sex couples, marriage for different-sex ones) is sufficient at present: it has not aspired to seeking to create full symmetry of access between couples. As discussed, its acceptance so far of the ghettoisation of formalisation of relationships based on sexual orientation as non-discriminatory is attributable to its position as an international court dependent on the doctrine of subsidiarity.

It is undoubtedly the case that in the movement towards creation of symmetry of access in this matter among the contracting states, two key phases are apparent, affecting differing groups of states. First, and most significantly, in certain Eastern states the challenge is to rely on the ECHR to advance the cause of introducing same-sex registered partnerships for the first time, creating the possibility that current

complete asymmetry of access based on sexual orientation is incrementally rejected. Second, in those states which have already introduced registered partnerships, the challenge is to introduce same-sex marriage. These arguments rest on the impairment of equality values,[124] and the assault on the dignity of same-sex couples as a group, that such forms of asymmetry entail.

In furtherance of both those causes, this article has argued for rejection of asymmetry of access in Member States, where same-sex registered partnerships, and even same-sex marriage, are already available. It has presented that argument on the basis that as further states move towards achievement of full or partial symmetry of access in this matter, the position of those Eastern states that have not yet introduced registered partnerships will be revealed as more starkly anomalous, but so will the anomaly of offering *either* same-sex or different-sex couples two options as to formalisation of relationships. Preservation of the registered partnership model in the face of same-sex marriage not only has the potential to affect consensus analysis at Strasbourg, narrowing the margin of appreciation for states refusing to accept symmetry of access, it also recognises the worth of that model as a particular conception of the public expression of a relationship, untainted by patriarchal or heteronormative values historically associated with the institution of marriage.

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1.
There is no clear consensus as to the states that make up "Eastern" Europe since definitions use differing parameters for inclusion, such as geographical territory, culture or membership of international/regional organisations. Cognisant of these variations, and that certain states may equally be classified as Central European, "Eastern" Member States of the Council of Europe will be taken to include: Albania, Bosnia and Herzegovina, Bulgaria, Croatia, Estonia, Hungary, Latvia, Lithuania, Moldova, Macedonia, Montenegro, Poland, Romania, Serbia, Slovenia, the Czech Republic, the Slovak Republic. The Member States of Georgia, Azerbaijan, Armenia, Russia, Ukraine, Turkey are listed by some authorities as European, by others as Asian. For convenience the term, "Eastern" will be used to include these Member States also.

2.
See H. Fenwick, "Same Sex Unions at the Strasbourg Court in a Divided Europe: Driving Forward Reform or Protecting the Court's Authority via Consensus Analysis" [2016] 3 E.H.R.L.R. 248 at 265, 268, as to the lived experiences of same-sex couples in certain Eastern states.

3.
That term is used as the commonly accepted one in the ECHR contracting states to denote formalised partnerships outside marriage.

4.
See H. Fenwick, "Same Sex Unions at the Strasbourg Court in a Divided Europe: Driving Forward Reform or Protecting the Court's Authority via Consensus Analysis" [2016] 3 E.H.R.L.R. 248, 250–252 and *H. Fenwick, "Enhanced subsidiarity and a dialogic approach or appeasement in recent cases on Criminal Justice, Public Order and Counter-terrorism at Strasbourg against the UK" in K. Ziegler, E. Wicks and L. Hodson, The European Court of Human Rights and the UK——a Strained Relationship (Oxford: Hart Publishing, 2016) p.194*.
5.
See L. Wildhaber, A. Hjartarson and S. Donnelly, "No Consensus on Consensus? The Practice of the European Court of Human Rights" (2013) 33 Human Rights Law Journal 248.
6.
It should be pointed out that prohibitions on entering formal relationship statuses are usually based formally on gender (e.g. using terms such as "of the same sex"). There is no requirement that persons prevented from entering the status in question are in fact homosexual.
7.
For comparative analysis see *I. Curry-Sumner, All's Well That Ends Registered? The Substantive and Private International Law Aspects of Non-Marital Registered Relationships in Europe (Cambridge: Intersentia, 2005)*; *J.M. Scherpe and A. Hayward, The Future of Registered Partnerships (Cambridge: Intersentia, 2017)*; *K. Boele-Woelki and A. Fuchs, Same-Sex Relations and Beyond—Gender Matters in the EU (Cambridge: Intersentia 2017)*; and *K. Waaldijk et al., "More and more together: Legal family formats for same-sex and different-sex couples in European countries: Comparative analysis of data in the LawsAndFamilies Database"*, (2017), http://www.familiesandsocieties.eu/wp-content/uploads/2017/04/WorkingPaper75.pdf [Accessed 13 November 2017].
8.
The following countries currently authorise some form of registered partnership for same-sex couples: The Netherlands (1998), Spain (1998), France (1999), Belgium (2000), Portugal (2001), Luxembourg (2004), the United Kingdom (2004), Andorra (2005), the Czech Republic (2006), Slovenia (2006), Switzerland (2007), Hungary (2009), Austria (2010), Liechtenstein (2011), Croatia (2014), Malta (2014), Greece (2015), Cyprus (2015), Italy (2016), Estonia (2016). It should be noted that several jurisdictions originally introduced same-sex registered partnerships but phased them out following the subsequent introduction of same-sex marriage: Denmark (1989), Norway (1993), Iceland (1996), Germany (2001), Finland (2002), Ireland (2010).
9.
Namely, and in chronological order; the Netherlands (2001), Belgium (2003), Spain (2005), Norway (2009), Sweden (2009), Portugal (2010), Iceland (2010), Denmark (2012), France (2013), United Kingdom (excluding Northern Ireland) (2014), Luxembourg (2015), Ireland (2015), Finland (2017), Malta (2017) and Germany (2017). The number of Council of Europe states to have introduced same-sex marriage proposals is increasing. For example, following a Federal Assembly vote in June 2017, a parliamentary study on same-sex marriage will take place in Switzerland. Similarly, in Austria there have been multiple petitions and proposals calling for the introduction of same-sex marriage introduced into Parliament, largely spearheaded by the Austrian Green Party.
10.

Note that both same and different-sex couples can also access limited rights via unregistered cohabitation in Croatia, Hungary and the Czech Republic.

11.

See *K. Waaldijk, "Small Change: How the Road to Same-Sex Marriage Got Paved in the Netherlands" in R. Wintemute and M. Andenaes, Legal Recognition of Same-Sex Partnerships: A Study of National, European and International Law (Oxford: Hart Publishing, 2001).*

12.

See the *chapters in Part I of J.M. Scherpe and A. Hayward, The Future of Registered Partnerships (Cambridge: Intersentia, 2017).*

13.

See, e.g. The Netherlands, France, Belgium and Luxembourg where this pattern emerged. For an overview of this trend, see also J.M. Scherpe, "Quo Vadis, Civil Partnership?" (2015) 46 Victoria University of Wellington Law Review 755.

14.

With 14 votes in favour, 94 against and 20 abstentions.

15.

A 2015 referendum intended to lead to strengthening the constitutional ban on same-sex marriage and same-sex adoption in the Slovak Republic was declared invalid after only just over 20 per cent of voters responded.

16.

The Bill was put forward on 30 January 2015 by Veiko Spolitis, a Member of Parliament for Straujuma's Unity party.

17.

By the Legal Affairs Committee on 24 February 2015: *Latvijas Sabiedriskie mediji*.

18.

As reported on 20 September 2015.

19.

As reported on 19 December 2014, at the latest attempt 185 MPs voted for the bill, with 235 against, and 18 abstentions.

20.

The following Eastern countries have constitutional prohibitions on same-sex marriage and/or definitions of marriage as an exclusively heterosexual union: Bulgaria (1991), Moldova (1994), Belarus (1994), Ukraine (1996), Poland (1997), Serbia (2006), Montenegro (2007), Hungary (2012), Croatia (2013), Slovakia (2014) and Armenia (2015). Following a public petition and with support from all political parties, Romania is set to hold a constitutional referendum in Autumn 2017 that, if successful, will amend their currently gender-neutral definition of marriage to one that is limited to different-sex couples only.

21.

See *M. Novak, "Slovenia rejects same-sex marriages in referendum" (December 20 2015), Reuters*, http://uk.reuters.com/article/uk-slovenia-rights/slovenia-rejects-same-sex-marriages-in-a-referendum-idUKKBN0U30BQ20151220 [Accessed 16 November 2017]. The majority against was 63.51%.

22.

Notable examples of equality of access for all couples include The Netherlands, France and Belgium, although note that the level of legal protection as between marriage and registered partnership may vary.

23.

A term used in the *Department for Culture, Media and Sport Report, Civil Partnership Review (England and Wales): A Consultation (London, 2014), para.3.10*.

24.

This applies to: Albania, Azerbaijan, Armenia, Bosnia and Herzegovina, Bulgaria, Georgia, Macedonia, Moldova, Montenegro, Poland, Romania, Russia, Serbia, Slovakia, Turkey, Ukraine. Note, however, that Monaco, the Vatican City and San Marino (except for immigration purposes) also do not recognise same-sex registered partnerships or marriages.

25.

This would be the position in Andorra, Greece, Cyprus, and Estonia. See *D. Lima, "Registered Partnerships in Greece and Cyprus" in J.M. Scherpe and A. Hayward, The Future of Registered Partnerships (Cambridge: Intersentia, 2017)*.

26.

See *A. Hayward, "Registered Partnerships in England and Wales" and "The Future of Civil Partnership in England and Wales" in J.M. Scherpe and A. Hayward, The Future of Registered Partnerships (Cambridge: Intersentia, 2017)*.

27.

See *K. McK Norrie, "Civil Partnership in Scotland 2004–14, and Beyond" in N. Barker and D. Monk, From Civil Partnership to Same-Sex Marriage: Interdisciplinary Reflections (Abingdon: Routledge, 2015)* and *K. McK Norrie, "Registered Partnerships in Scotland" in J.M. Scherpe and A. Hayward, The Future of Registered Partnerships (Cambridge: Intersentia, 2017)*.

28.

Notably, Austria, Croatia, Czech Republic, Italy, Hungary, Liechtenstein, Switzerland and the United Kingdom (Northern Ireland only). Note that within the United Kingdom there is considerable variation: Jersey conforms to this model following the introduction of same-sex civil partnerships in 2012 and the failure to introduce same-sex marriage. In contrast, the Isle of Man extended its exclusively same-sex civil partnership regime, introduced in 2011, to different-sex couples in 2016.

29.

For example, registered partnership schemes in Croatia, Czech Republic, Hungary, Italy and Slovenia do not permit joint adoption. Similar variations also apply in relation to access to in-vitro fertilisation.

30.

For a comparative overview see *J.M. Scherpe, "The Past, Present and Future of Registered Partnerships" in J.M. Scherpe and A. Hayward, The Future of Registered Partnerships (Cambridge: Intersentia, 2017)*.

31.

See N. Bamforth, "The Benefits of Marriage in All But Name: Same-sex Couples and the Civil Partnership Act 2004" (2007) 19(2) Child and Family Law Quarterly 133.

32.

Wilkinson v Kitzinger (No.2) [2006] EWHC 2022 (Fam) at [88] (Potter P). See also B. Hale, "Homosexual Rights" [2004] 16 Child and Family Law Quarterly 125, 132.

33.

See *W. Eskridge, Equality Practice: Civil Unions and the Future of Gay Rights (New York: Routledge, 2002)* and *I. Curry-Sumner, "Same-sex relationships in a European perspective" in J.M. Scherpe, European Family Law Volume III——Family Law in a European Perspective (Edward Elgar, 2016)*.

34.

See *Taddeucci and McCall v Italy (App. No.51362/09), judgment of 30 June 2016* at [88]. See further L. Wildhaber, A. Hjartarson and S. Donnelly, "No Consensus on Consensus? The Practice of the European Court of Human Rights" (2013) 33 Human Rights Law Journal 248, 252. See further T. Zwart as to lack of clarity in the Court's consensus analysis: "More human rights than Court: why the legitimacy of the ECtHR is in need of repair and how it can be done" in *S. Flogaitis, T. Zwart and J. Fraser, The European Court of Human Rights and its Discontents: Turning Criticism into Strengths (Edward Elgar Publishing, 2013), p.71*; see also L.R. Helfer, "Consensus, Coherence and the European Convention on Human Rights" (1993) 23 Cornell International Law Journal 133.

35.

See H. Fenwick, "Same Sex Unions at the Strasbourg Court in a Divided Europe: Driving Forward Reform or Protecting the Court's Authority via Consensus Analysis?" [2016] 3 E.H.R.L.R. 249 and *C. Draghici, The Legitimacy of Family Rights in Strasbourg Case Law: 'Living Instrument' or Extinguished Sovereignty? (Oxford: Hart Publishing, 2016).*

36.

Spielmann finds that reliance on the margin of appreciation "makes for a body of human rights law that accepts pluralism over uniformity, as long as the fundamental guarantees are effectively observed" in D. Spielmann, "Whither the Margin of Appreciation?" (2014) 67 Current Legal Problems 49. See also *A. Legg, The Margin of Appreciation in International Human Rights Law: Deference and Proportionality (Oxford: Oxford University Press, 2012).*

37.

Article 14 guarantees a right to freedom from discrimination in the enjoyment of the other rights.

38.

See *Karner v Austria (2004) 38 E.H.R.R. 24* at [41]. In *Vrountou v Cyprus (App. No.33631/06), judgment of 13 October 2015*, it was found: "references to traditions, general assumptions or prevailing social attitudes in a particular country are insufficient justification for a difference in treatment on grounds of sex".

39.

See *Konstantin Markin v Russia (2012) 56 E.H.R.R. 8*.

40.

X and Y v United Kingdom (App. No.9369/83), judgment of 3 May 1983. See also *S v United Kingdom (App. No.11716/85), judgment of 14 May 1989*. Note the parallels with domestic law developments: *Dyson Holdings Ltd v Fox [1976] Q.B. 503* recognised that different-sex cohabitants would constitute a family for the purposes of succession to a tenancy.

41.

Schalk v Austria (2011) 53 E.H.R.R. 20. See in the domestic context *Ghaidan v Godin-Mendoza [2004] 2 A.C. 557*.

42.

Schalk (2011) 53 E.H.R.R. 20 at [90]. See further N. Bamforth, "Families but Not (Yet) Marriages? Same-Sex Partners and the Developing European Convention 'Margin of Appreciation'" [2011] Child and Family Law Quarterly 128.

43.

Schalk (2011) 53 E.H.R.R. 20 at [26] and [94]. The Court referenced, at [26], Directive 2004/38 of the European Parliament and Council of 29 April 2004

art.2 concerning free movement of family members, and European Council Directive 2003/86 of 22 September 2003 art.4 concerning family reunification.

44.
Schalk (2011) 53 E.H.R.R. 20 at [99]. That was confirmed by the Grand Chamber in *X v Austria (2013) 57 E.H.R.R. 14*.

45.
Schalk (2011) 53 E.H.R.R. 20 at [61] and [101].

46.
Schalk (2011) 53 E.H.R.R. 20 at [107].

47.
Schalk (2011) 53 E.H.R.R. 20 at [109].

48.
Vallianatos v Greece (2014) 59 E.H.R.R. 12. See R. George, "Civil Partnerships, Sexual Orientation and Family Life" (2014) 73(2) Cambridge Law Journal 260.

49.
Vallianatos v Greece (2014) 59 E.H.R.R. 12 at [91] and [92]. 19 states (the minority) at that point had introduced such forms of registered partnership.

50.
Vallianatos (2014) 59 E.H.R.R. 12 at [73] and [74].

51.
Vallianatos (2014) 59 E.H.R.R. 12 at [78]; see the findings in *Schalk (2011) 53 E.H.R.R. 20* at [99].

52.
See *Vallianatos (2014) 59 E.H.R.R. 12* at [81] where the Court noted that "the option of entering into a civil union would afford [a same sex couple] the only opportunity available to them under Greek law of formalising their relationship by conferring on it a legal status recognised by the state".

53.
Following *Vallianatos*, the Greek government introduced a Bill to Parliament on the 22 December 2015 giving civil union rights to same-sex couples. Of the members of Parliament present, 193 voted in favour of the Bill and 56 against; the Bill became law on 24 December 2015. See *D. Lima, "Registered Partnerships in Greece and Cyprus" in J.M. Scherpe and A. Hayward, The Future of Registered Partnerships (Cambridge: Intersentia, 2017).*

54.
Oliari v Italy (2017) 65 E.H.R.R. 26. The claim was brought by three same-sex couples under art.8 read alone or with 14 (as well as arts 12 and 14). See A. Hayward, "Same-sex Registered Partnerships—A Right to be Recognised?" (2016) 75(01) Cambridge Law Journal 27.

55.
Oliari (2017) 65 E.H.R.R. 26 at [169].

56.
Oliari (2017) 65 E.H.R.R. 26 at [173].

57.
Oliari (2017) 65 E.H.R.R. 26 at [159].

58.
Oliari (2017) 65 E.H.R.R. 26 at [194].

59.
Oliari (2017) 65 E.H.R.R. 26 at [191]–[192]. Cf. *Hirst v United Kingdom (No.2) (2004) 38 E.H.R.R. 40* at [81].

60.
Taddeucci v Italy (App. No.51362/09), judgment of 30 June 2016.
61.
Hämäläinen v Finland (App. No.37359/09) judgment of 16 July 2014.
62.
As noted by the Court at [96], "some Contracting States have extended marriage to same-sex partners [but] Article 12 cannot be construed as imposing an obligation on the Contracting States to grant access to marriage to same-sex couples".
63.
See *Hämäläinen v Finland (App. No.37359/09) judgment of 16 July 2014*.
64.
The applicants in *Oliari* did not argue for a right to marry under art.8 read with art.14 but sought to rely on art.12 read with art.14; that claim was found inadmissible (at [193] and [194]) on the basis that if in *Schalk* (at [101]) a right to same-sex marriage could not be derived from art.8 read with art.14 on the basis of its more general purpose, the same would be said more clearly under arts 12 and 14. In *Schalk* an argument for same-sex marriage based on art.12 was also rejected (at [61]).
65.
Schalk (2011) 53 E.H.R.R. 20 at [61].
66.
Schalk (2011) 53 E.H.R.R. 20 at [61].
67.
Oliari (2017) 65 E.H.R.R. 26 at [162].
68.
Scotland is in a similar position. See the *Review of Civil Partnership: a Consultation by the Scottish Government, September 2015*. An analysis of consultation responses was published in August 2016, but the Government's own conclusions are awaited.
69.
Civil partnership is defined by s.1(1) of the Civil Partnership Act 2004 as "a relationship between *two people of the same sex* when they register as civil partners of each other".
70.
See Civil Partnership Act 2004 s.3(1)(a).
71.
For analysis of the reasoning by Andrews J in the High Court see R. Wintemute, "Civil Partnership and Discrimination in R (Steinfeld) v Secretary of State for Education" [2016] 28(4) Child and Family Law Quarterly 365 and L. Ferguson, "The Curious Case of Civil Partnership: The Extension of Marriage to Same-Sex Couples and the Status-Altering Consequences of a Wait-And-See Approach" [2016] 28(4) Child and Family Law Quarterly 347.
72.
Steinfeld v Secretary of State for Education [2017] EWCA Civ 81 at [25]–[46], esp. [29]. See also A. Hayward, "Justifiable Discrimination: The Case of Opposite-Sex Civil Partnerships" (2017) 76(2) Cambridge Law Journal 243.
73.
Steinfeld [2017] EWCA Civ 81 at [29] referring to *Oliari Italy (2017) 65 E.H.R.R. 26* at [70]–[71].
74.
Oliari (2017) 65 E.H.R.R. 26 at [39], [70].
75.

Steinfeld [2017] EWCA Civ 81 at [40].
76.
Karner v Austria (2004) 38 E.H.R.R. 24 at [41].
77.
Steinfeld [2017] EWCA Civ 81 at [98].
78.
Steinfeld [2017] EWCA Civ 81 at [114].
79.
Steinfeld [2017] EWCA Civ 81 at [110]–[127].
80.
Steinfeld [2017] EWCA Civ 81 at [173].
81.
Steinfeld [2017] EWCA Civ 81 at [157].
82.
Steinfeld [2017] EWCA Civ 81 at [174]–[175].
83.
Taddeucci v Italy (App. No.51362/09), judgment of 30 June 2016 at [89].
84.
See the comments of Lord Wilson on the matter of such outpacing in the minority in the Supreme Court in *Moohan v Lord Advocate [2014] UKSC 67, [2015] A.C. 901* at [105], [106].
85.
See *R. (on the application of Nicklinson) (Appellants) v Ministry of Justice (Respondent) [2014] UKSC 38*. Note that a Declaration of Incompatibility under s.4 of the HRA would not be inevitable, even if that incompatibility was found.
86.
Ratzenböck v Austria (App. No.28475/12), judgment of 26 October 2017. (Note: this had to be added in brief at proof state).
87.
There is momentum behind the introduction of same-sex marriage in Austria, particularly after the removal of several legal distinctions between marriage and registered partnership. The Green Party, which introduced a Bill into Parliament in 2015, and an initiative entitled "Ehe Gleich!" (Equal Marriage) http://www.ehe-gleich.at [Accessed on 13 November 2017], has been active in challenging the current law. On 12 October 2017 the Austrian Constitutional Court instituted proceedings that potentially pave the way to the opening up of marriage to same-sex couples and the repeal of the same-sex only registered partnership scheme. The final judgment of the Constitutional Court is expected in December 2017. Same-sex couples could be allowed to marry in Austria from January 2018. This could be the first time a domestic European court has found that a ban on marriage for same-sex couples is unconstitutional.
88.
On 22 September 2011 (B 1405/109).
89.
For criticism of the patriarchal and hetero-normative associations of marriage see S. Jeffreys, "The Need to Abolish Marriage" (2004) 14(2) Feminism & Psychology 327, R. Auchmuty, "Same-Sex Marriage Revived: Feminist Critique and Legal Strategy" (2004) 14(1) Feminism & Psychology 101 and *N. Barker, Not the Marrying Kind: A Feminist Critique of Same-Sex Marriage (Palgrave Macmillan, 2012).*
90.

Communicated on 2 May 2016. The claim has reached the facts and questions stage.
91.
Oliari (2017) 65 E.H.R.R. 26 at [185].
92.
See the concurring opinion of Judges Mahoney, Tsotsoria and Vehabović who found a violation of art.8 but on narrow reasoning limited to the situation in Italy.
93.
21 October 2010. The Court found violations of art.11 read with art.14 in respect of a refusal to permit LGBT Pride events in Moscow in 2006, 2007, 2008. At [81] the Court found: "… it would be incompatible with the underlying values of the Convention if the exercise of Convention rights by a minority group were made conditional on its being accepted by the majority. Were this so, a minority group's rights to freedom of religion, expression and assembly would become merely theoretical …".
94.
Differentiation based on a certain level of such benefits to same-sex registered partners as opposed to different-sex married partners is direct discrimination under EU law: *Jürgen Römer v Freie und Hansestadt Hamburg (C-147/08) [2011] E.C.R. I-3591*.
95.
See *Rechtskomitee LAMBDA, "European Human Rights Court Opens Proceedings on Heterosexual Couples' Exclusion from Registered Partnership" (27 March 2015)*http://www.rklambda.at/index.php/en/news-en/251-european-human-rights-court-opens-proceedings-on-heterosexual-couples-exclusion-from-registered-partnership [Accessed 13 November 2017].
96.
In *Vallianatos (2014) 59 E.H.R.R. 12* the Court was not convinced by the aim of the policy, of protecting the family in the traditional sense, terming it "rather abstract": at [84]. That point had previously been made in *Karner (2004) 38 E.H.R.R. 24* at [41] See also the challenge to the 2013 law in France legalising same-sex marriage: Decision no.2013-669 DC, 17.5.13, Considerant no.22; the challenge failed.
97.
Oliari (2017) 65 E.H.R.R. 26 at [185].
98.
Re P (Northern Ireland) [2008] UKHL 38 at [120].
99.
E.g. the Supreme Russian Court has found that the national Constitution takes precedence over the ECHR, and decisions by the European Court of Human Rights should be upheld only if they do not contradict basic Russian law (see *Russia Today, "Constitutional Court rules Russian law above European HR Court decisions" (14 July 2015)*,https://www.rt.com/politics/273523-russia-court-rights-constitution/ [Accessed 13 November 2017]. See further *L. Mällesoo, Russian Approaches to International Law (Oxford: Oxford University Press, 2015) esp at Chs 1.3 and 4*; see also *A. Sperti, Constitutional Courts, Gay Rights and Sexual Orientation Equality (Oxford: Hart, 2017)*.
100.
On this point, see the two recent Northern Irish High Court decisions: *In the Matter of the Application by Grainne Close, Shannon Sickles, Christopher Flanagan Kane and Henry Flanagan Kane for Judicial Review [2017] N.I.Q.B. 79* and *Re X [2017] NI Fam. 12*. In the former case two couples in civil partnerships brought a case against

the Department of Finance, which regulates Northern Ireland's marriage laws, on the ground that the ban on same-sex marriage contravenes arts 12 and 8 of the ECHR. The latter case, known as Petition X, involves two men who married in England in 2014 and are attempting to have their union recognised in Northern Ireland where their marriage was automatically converted to a civil partnership when they moved there. Both claims were dismissed on the basis that no obligation is imposed on the domestic court to give an interpretation of the Convention at variance with that provided by the Strasbourg Court, particularly as "same sex marriage is not even a Convention right". On Petition X, see A. Lester, "Should Same Sex Marriage be Legally Recognised in Northern Ireland?" [2017] 5 E.H.R.L.R.432.

101.

Vallianatos (2014) 59 E.H.R.R. 12 at [81]. That point was reiterated in *Oliari (2017) 65 E.H.R.R. 26* at [174].

102.

N. Bamforth, "Same-sex Partnerships: Some Comparative Constitutional Lessons" [2007] 1 E.H.R.L.R.47, 54.

103.

See *Pretty v United Kingdom (2002) 35 E.H.R.R. 1* at [65]. See further C. McCrudden, "Human Dignity and Judicial Interpretation of Human Rights" (2008) 19(4) European Journal of International Law 655–656, 683.

104.

By Dyson J in *RT (Zimbabwe) v Secretary of State for the Home Department (United Nations High Commissioner for Refugees intervening) (2012) UKSC*, relying on the reference to dignity in the UDHR at [29]–[30], [39].

105.

See *Obergefell v Hodges 576 US (2015) 26 June* at [28]: "There is dignity in the bond between two men or two women who seek to marry …". See also the observations of Sachs J in *Minister of Home Affairs v Fourie (CCT 60/04) [2005] ZACC 19* noting, at [71], that exclusion of same-sex couples from marriage "reinforces the wounding notion that they are to be treated as biological oddities, as failed or lapsed human beings who do not fit into normal society, and, as such, do not qualify for the full moral concern and respect that our Constitution seeks to secure for everyone".

106.

See pronouncements to the effect that the exclusion of same-sex couples from civil marriage violate dignity as guaranteed for individuals by particular constitutions, made in the context of unequal treatment generally, disadvantaging same-sex relationships: see *Goodridge v Department of Public Health (2003) 798 N.E. 2d 941*. See also Baroness Hale in *Ghaidan v Godin-Mendoza [2004] UKHL 30* at [132]. See also *Pretty v United Kingdom (2002) 35 E.H.R.R. 1* at [65]. See also D. Feldman, "Human Dignity as a Legal Value: Part I" [1999] Public Law 682, 685–686.

107.

See N. Bamforth, "Same-sex Partnerships: Some Comparative Constitutional Lessons" (2007) 1 E.H.R.L.R.47, 53–56 and *T. Khaitan, A Theory of Discrimination Law (Oxford: Oxford University Press, 2015), p.6*.

108.

Mikulić v Croatia (App. No.53176/99), judgment of 7 February 2002 at [53]. See also *Pretty (2002) 35 E.H.R.R. 1* at [61].

109.

Pretty (2002) 35 E.H.R.R. 18 at [90].

110.

See *Unal Tekeli v Turkey (2006) 42 E.H.R.R. 53*.

111.

See e.g. the Marriage and Civil Partnership (Amendment) Act 2016 that simultaneously introduced same-sex marriage and extended civil partnerships to different-sex couples in the Isle of Man.

112.

As in, for example, Ireland: see B. Tobin, "Marriage Equality in Ireland: The Politico-Legal Context" [2016] International Journal of Law, Policy and the Family 115. For a comparative law analysis of the different approaches taken by jurisdictions following the introduction of same-sex marriage, see *K. Boele-Woelki and A. Fuchs, Legal Recognition of Same Sex Relationships in Europe: National, Cross-Border and European Perspectives (Cambridge: Intersentia 2012)* and *J.M. Scherpe and A. Hayward, The Future of Registered Partnerships (Cambridge: Intersentia 2017)*.

113.

It is clearly established that marriage is *widely* perceived to be the "gold standard" for different-sex couples. See, generally, M.A. Fineman, "Why Marriage?" (2001) 9 Virginia Journal of Social Policy and the Law 239; *M.L. Shanley, Just Marriage (Oxford: Oxford University Press, 2004)*; *S. Golombok, Modern Families: Parents and Children in New Family Forms (Cambridge: Cambridge University Press, 2015)*; and *C.A. Ball, Same-Sex Marriage and Children: A Tale of History, Social Science and Law (Oxford: Oxford University Press, 2014)*.

114.

See *K. Waaldijk, "Small Change: How the Road to Same-Sex Marriage Got Paved in the Netherlands" in R. Wintemute and M. Andenaes, Legal Recognition of Same-Sex Partnerships: A Study of National, European and International Law (Oxford: Hart Publishing, 2001), p.437*.

115.

Such questioning has also been noted by academics: see C. Stychin, "Not (Quite) a Horse and Carriage: The Civil Partnership Act 2004" [2006] 14 Feminist Legal Studies 79 and K. McK Norrie, "Marriage is for Heterosexuals——May the Rest of Us be Saved from It" [2000] 12 Child and Family Law Quarterly 363.

116.

See N. Polikoff, "Ending Marriage as We Know It" (2003) 32 Hofstra Law Review 201 and J. Butler, "Is Kinship Always Already Heterosexual?" (2002) 8(3) Differences: A Journal of Feminist Cultural Studies 369.

117.

See J. Haskey, "Civil Partnerships and Same-sex Marriages in England and Wales: A Social and Demographic Perspective" [2016] Family Law 44, noting that only one in eight civil partnerships have been converted to marriages. Note recent statistics showing the first increase in civil partnership uptake since 2013: *Office for National Statistics, Civil Partnerships in England and Wales in 2016: —Statistical Bulletin (27th September 2017)*.

118.

In contrast to the relatively large amount of civil partnership registrations entered into during the first three days in which registrations could take place, only 93 same-sex marriages took place during the equivalent period of time. See *Office of National Statistics, Civil Partnerships in England and Wales in 2015: Statistical Bulletin, (8 September 2016)*.

119.

See *G. Willems, "Registered Partnerships in Belgium" in J.M. Scherpe and A. Hayward, The Future of Registered Partnerships (Cambridge: Intersentia 2017)* on the continued popularity of "*cohabitation légale*" in Belgium for same-sex couples, post same-sex marriage (although note the legal rights between the two relationship forms vary).

120.

It is important to note that nearly half (48%) of all individuals forming civil partnerships in 2015 were aged 50 and over. See *Office of National Statistics, Civil Partnerships in England and Wales in 2015: Statistical Bulletin (8 September 2016)*. See also a similar observation made in *Steinfeld [2017] EWCA Civ 81* by Arden LJ at [121] who noted that "numbers for this group are clearly not insignificant".

121.

See generally, *J. Corvino and M. Gallagher, Debating Same Sex Marriage (Oxford: Oxford University Press, 2012)* and *S. Cretney, Same Sex Relationships: From "Odious Crime" to "Gay Marriage" (Oxford: Oxford University Press, 2006), Ch.1*.

122.

Note, for example, the popularity of the French registered partnership scheme, see L. Francoz Terminal, "From Same-Sex Couples to Same-Sex Families? Current French Legal Issues" [2009] 21(4) Child and Family Law Quarterly 485 and *L. Francoz Terminal, "Registered Partnership in France" in J.M. Scherpe and A. Hayward, The Future of Registered Partnerships (Cambridge: Intersentia, 2017).* For a similar reception in the Netherlands, see *K. Boele-Woelki, I. Curry-Sumner, M. Jansen and W. Schrama, Huwelijk of geregistreerd partnerschap? (Marriage or Registered Partnership?) (Kluwer, 2007)* (English summary available https://www.wodc.nl/binaries/1344-summary_tcm28-68894.pdf[Accessed 13 November 2017]).

123.

Department for Culture, Media and Sport, Civil Partnership Review (England and Wales): A Consultation, London, 2014, para 3.10, noting "[u]p to 50,000 UK couples could be left in a legacy relationship which would increasingly become a legal relic and which the State would have to continue to administer".

124.

See *N. Bamforth, "Same-Sex Partnerships and Arguments of Justice" in R. Wintemute and M. Andenaes (eds), Legal Recognition of Same-Sex Partnerships——A Study of National, European and International Law (Oxford: Hart Publishing, 2001), p.39*.